CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1878.

No. [illegible] 42

THE NEW ENGLAND RAILROAD COMPANY, PLAINTIFF IN ERROR,

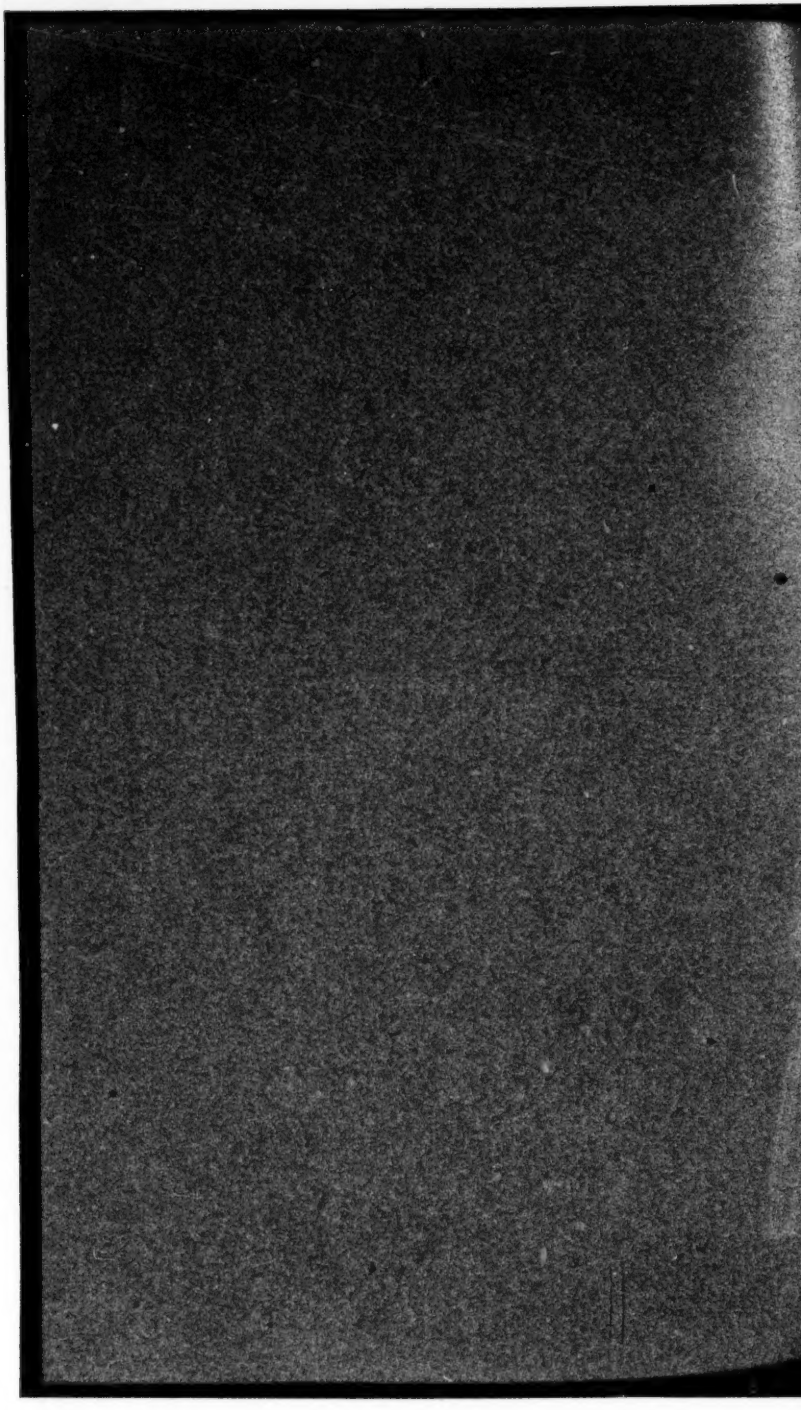
vs.

ROBERT T. CONROY, ADMINISTRATOR.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

FILED JANUARY 26, 1878.

(16,781.)



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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 15, 1898.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1897.

THE NEW ENGLAND RAILROAD COMPANY, Defendant, Plaintiff in Error,
v.
ROBERT T. CONROY, Administrator, Plaintiff, Defendant in Error.
} No. 207.

Error to the circuit court of the United States for the district of Massachusetts.

Before Colt, Webb, and Aldrich, JJ.

Questions of Law Certified by the United States Circuit Court of Appeals for the First Circuit to the Supreme Court of the United States.

December 24, 1897.

The facts in this case are as follows:

On the fifteenth day of December, 1894, a freight train of the defendant company, drawn by a steam locomotive, and carrying an engineer, a fireman, three brakeman and a conductor set out from Worcester, in the Commonwealth of Massachusetts, for the city of Providence, in the State of Rhode Island. The train, which consisted of the locomotive and tender, thirteen or fourteen freight cars and a caboose car, was heavily loaded with freight. The train left Worcester at about 7.15 p. m. and proceeded on its way without accident, until when at a point on the railroad in the State of Rhode
2 Island, away from telegraphic communication and not at a station, and distant from Providence about sixteen miles, the engineer discovered by the motion and behavior of the locomotive that the train had broken apart. He immediately gave signals with the whistle to indicate to the trainmen upon the rear portion of the train that it was broken off, and continued to repeat those signals, which consisted of three rapid blasts of the whistle with very brief intervals between the different threes, while the locomotive and the one car which remained connected ran three-quarters of a mile. The locomotive with the connected car ran about two and three-quarters miles when the engineer, not being able to see anything of the separated part of the train, and supposing that his signals had been heard and its advance stopped, slowed up the engine preparatory to sending the fireman back with the lantern and to take steps for restoring the connection of the parts of the train. Before speed had been so reduced that the fireman could alight from the train, the rear portion was discovered close at hand and approaching at great speed. The fireman gave notice of this fact and a signal for the locomotive to go ahead, but before it could gain speed to get away a collision between the two parts of the train took place, and one Gregory, a brakeman, who was on the top of the car still attached

to the engine, was thrown from the car by the shock and instantly killed.

The three brakemen on the train were a head, a middle and a rear brakeman. Gregory was the head brakeman, and at once, on discovery of the separation of the train, went to the top of the only car left with the engine. The conductor and the middle and rear brakeman had been riding in the caboose car at the rear end of the train, and did not hear the warning signals which the engineer gave with the whistle, nor know that the train had broken until the collision, but remained all the time in the caboose. The night was cold and clear. The accident was near midnight.

3 The negligence complained of consisted in the alleged failure of the conductor in control of the men and in charge of the train, in view of the character of the night, the character of the road in respect to grades and curves, the speed at which the train was run, and the liability of the train to part asunder at that place, to properly watch and supervise its movements, and the fact that he, in the full knowledge that the rear and middle brakemen were in the caboose, away from their brakes, permitted them to remain there, and failed to order them to the brakes.

The jury were instructed: "The conductor of the train, under the rules laid down by the rules of the Supreme Court of the United States, is in a peculiar and special condition. The conductor of the train, as I understand the theory of the rule of the Supreme Court of the United States, is, in a certain sense, between stations, at least, is in a certain sense like the master of a ship on a voyage; he is beyond the reach of orders when running his train between stations; and therefore as a matter of necessity, as a matter of public policy, I suppose, he must be held to stand in the place of the corporation itself. * * * If you find in this particular case, from the evidence in the case and such common knowledge as jurymen are entitled to use, that by the rules of this road, * * * the conductor gave directions to the people who worked on the train, gave directions to start the train, gave directions to stop the train, gave directions as to the location and position of the different men on the train, and also had the general management of the train and control over it when running between stations, then I say to you, gentlemen, that he for this case represents the company, and if injuries resulted from his negligent acts the company is responsible."

The jury returned a verdict for the plaintiff, and assessed damages in the sum of four thousand two hundred and fifty dollars.

4 The defendant brought the case by writ of error to this United States circuit court of appeals for the first circuit.

And, upon consideration of the case, after full argument, the judges of this court desire the instructions of the Supreme Court upon the following questions of law arising on the facts as before stated:

1st. Whether the negligence of the conductor was the negligence of a fellow-servant of the deceased brakeman?

2d. Whether the negligence of the conductor was the negligence

of its vice, or substituted principal, or representative, for which the corporation is responsible?

It is now, to wit, December 24, 1897, ordered, that the foregoing statement of facts, and questions of law arising thereon, together with the fact that this court desires the instruction of the Supreme Court for the proper decision of said questions of law, be certified under the seal of this court, and transmitted to the Supreme Court.

By the court:

JOHN G. STETSON, *Clerk.*

5 *Certificate of Certification.*

United States Circuit Court of Appeals for the First Circuit.

And now here the judges of the United States circuit court of appeals for the first circuit certify that the foregoing is a true copy of an order of court entered on December 24, 1897, in said cause, numbered and entitled: No. 207, The New England Railroad Company, defendant, plaintiff in error, *v.* Robert T. Conroy, administrator, plaintiff, defendant in error, and that, pursuant to said order, the statement of facts and questions of law arising thereon, together with the fact that said circuit court of appeals desires the instruction of the Supreme Court of the United States for the proper decision of said questions of law contained in said order, are hereby certified under the seal of said United States circuit court of appeals for transmission to said Supreme Court.

Seal United States Circuit Court of Appeals, First Circuit.

In testimony whereof I hereto set my hand and affix the seal of said United States circuit court of appeals for the first circuit, at Boston, in the first judicial circuit, this thirteenth day of January, A. D. 1898.

JOHN G. STETSON, *Clerk.*

Endorsed on cover: Case No. 16,781. U. S. C. C. of appeals, first circuit. Term No., 229. The New England Railroad Company, plaintiff in error, *vs.* Robert T. Conroy, administrator. (Certificate.) Filed January 26th, 1898.

[illegible] Pleas Supreme Court [illegible]

[illegible] Carpenter vs Bush

1879

Vol. 6.

49 — 51

Oct Term 1879

No. 229. 42

Brief of Farnham for P. & O.

IN THE

SUPREME COURT OF THE UNITED STATES.

Filed Feb. 24, 1899.

RECORD, CASE NO. 16781.

TERM NO. 229. OCTOBER TERM, 1898.

THE NEW ENGLAND RAILROAD COMPANY, *Plaintiff in Error*

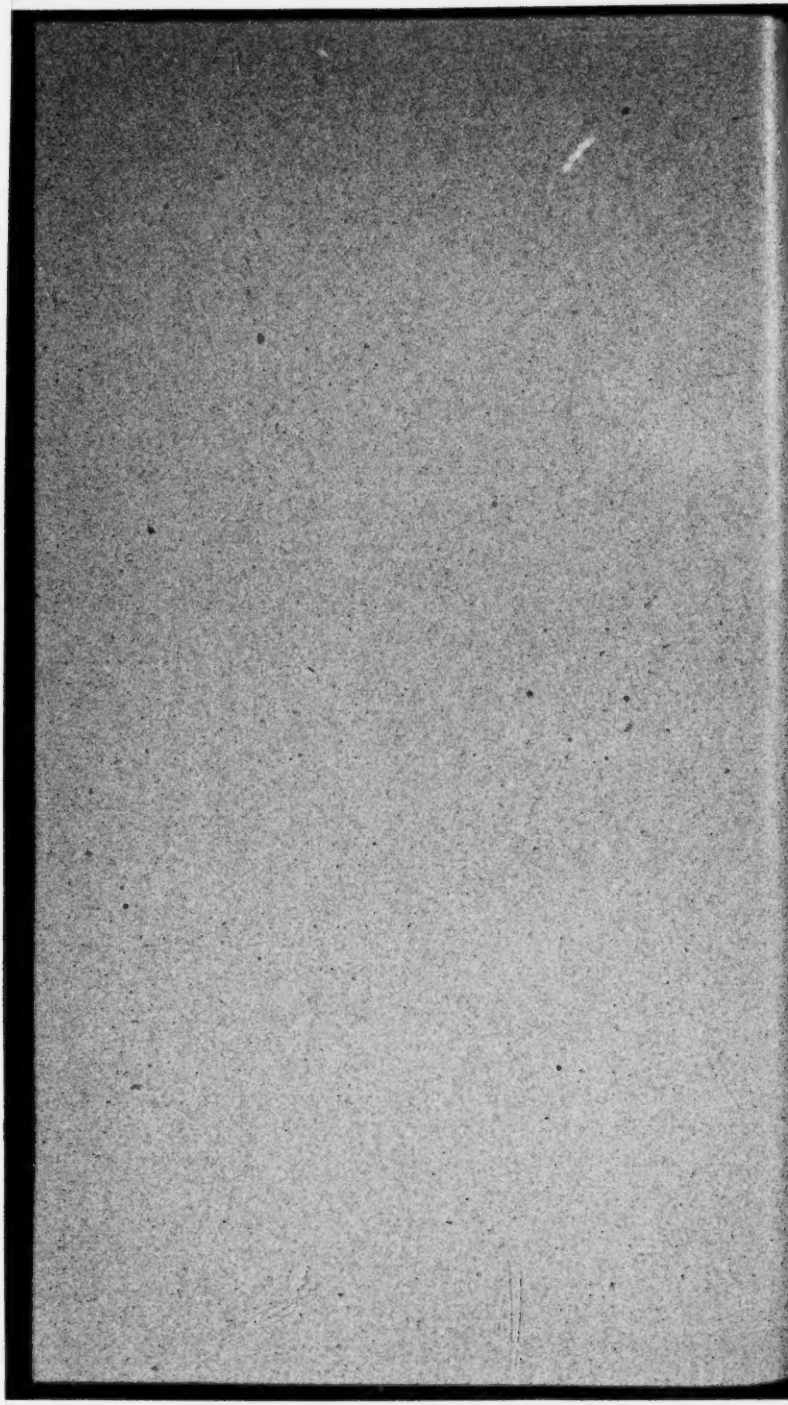
vs.

ROBERT T. CONROY, ADMINISTRATOR.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PLAINTIFF IN ERROR.

FRANK A. FARNHAM,
Counsel for Plaintiff in Error.



IN THE

SUPREME COURT OF THE UNITED STATES.

Record, Case No. 16781.
Term No. 229. October Term, 1898.

THE NEW ENGLAND RAILROAD COMPANY, *Plaintiff in Error*,

vs.

ROBERT T. CONROY, ADMINISTRATOR.

On a Certificate from the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This was an action brought by Conroy, administrator, defendant in error, to recover damages for the death of one Gregory, a freight brakeman in the employ of the plaintiff in error. On December 15, 1894, a freight train of the railroad company, whose crew consisted of an engineer, a fireman, three brakemen and a conductor, left Worcester, Massachusetts, for Providence, Rhode Island, about 7.15 P.M. the train consisting of a locomotive and tender with about fourteen loaded freight cars. It proceeded to a point in the state of Rhode Island where about midnight, while the train was in motion, the engineer discovered by the motion and behavior of the locomotive that the train had broken apart, the break occurring between the first and second cars of the train. He immediately gave signals with the whistle to indicate to the trainmen upon the rear portion that it was broken off, and continued to repeat these signals while the locomotive and one car ran three-quarters of

a mile. The front portion of the train ran about two and three-fourths miles when the engineer, not being able to see anything of the rear portion of the train, and supposing that his signals had been heard and its advance stopped, slowed up the engine preparatory to sending the fireman back with a lantern and taking steps for restoring the connection of the parts of the train. Before speed had been so reduced that the fireman could alight from the train, the rear portion was discovered close at hand and rapidly approaching. The fireman gave notice of this fact and signalled for the locomotive to go ahead, but before it could gain speed to get away a collision between the two parts of the train took place, and said Gregory, who was head end brakeman and who had been riding in the locomotive but had gone to the top of the first car when the separation was discovered, was thrown from the car by the shock and instantly killed.

The conductor and middle and rear brakemen had been riding in the caboose at the rear end of the train, and had not heard the warning signals which the engineer gave, nor known that the train had broken until the collision, but remained all the time in the caboose. The night was cold and clear.

The negligence complained of consisted in the alleged failure of the conductor in view of all the circumstances as to the character of the road, the speed of the train, and its liability to break apart, properly to supervise its movements, and the fact that he permitted the middle brakeman to remain in the caboose and failed to order him to the brakes.

The jury returned a verdict for the plaintiff and assessed damages in the sum of four thousand two hundred and fifty dollars.

The defendant brought the case by writ of error to the United States Circuit Court of Appeals for the First Circuit. After full argument the Judges of that Court in order to obtain instructions of the Supreme Court of the United States have certified the following questions of law arising upon the facts.

1. Whether the negligence of the conductor was the negligence of a fellow servant of the deceased brakeman.

2. Whether the negligence of the conductor was the negligence of its vice, or substituted principal, or representative, for which the corporation is responsible.

Brief of the Argument.

The point on which the instruction of this court is requested divides itself in the argument into two considerations:

1. Is the conductor of a train ever by virtue of his office so clothed with the management and control of a distinct department as to be a vice-principal? And if so,

2. Under the circumstances of this case was the alleged negligence of the conductor in respect of acts in which he was a vice-principal or in respect of acts in which he was a fellow servant with the trainmen?

I.

The necessary data to determine whether a conductor by virtue of his office may be a vice-principal are ready at hand. There would be little advantage in going outside of the two decisions of this court which embody all the principles of law necessary to decide the question, viz.

Baltimore & Ohio R.R. Co. vs. Baugh, 149 U. S. 368.
Chicago, Milwaukee & St. Paul Ry. Co. vs. Ross, 112 U. S. 377.

By an inexact method of expression it may be said that the decision of this question will determine whether the Ross case is still valid law or whether it no longer represents the opinion of this court. It is submitted however that such a finding is not involved in the decision of this case. The principle on which the Ross case was decided is undoubtedly valid. Whether or not the facts as to the powers and duties of the conductor which were assumed in that case, and which therein controlled the decision of the court, were such as to justify the application of the principle therein made, yet such application would not be justified by the facts in the case at bar or in any case likely to arise in future.

The principle of departmental control is too firmly established to admit of argument. This is the principle which governed the decision not only in the Ross case but in all cases decided by this court in recent years upon that branch of law. On the authority of the Baugh case the principle may be briefly stated as follows: Where the entire management of a business is put on a superintendent, he, though only an agent, is almost universally recognized as a representative of the principal. When the business becomes so vast and diversified that it neces-

sarily separates into departments of service, the individuals placed in charge of these departments and given entire management and control therein are practically considered, as to their subordinates, vice principals. This rule can be fairly applied only when the different branches and departments are in themselves separate and distinct, as for instance between the law department and the operating department of a railroad, or the operating and manufacturing or repair department. From this natural separation flows the rule that one in charge of such separate branch is in place of the master.

This principle has been further amplified and applied in

Northern Pacific R.R. Co. vs. Hambly, 154 U. S. 349.
Central R.R. Co. vs. Keegan, 160 U. S. 259.
Northern Pacific R.R. Co. vs. Peterson, 162 U. S. 346.
Alaska Mining Co. vs. Whelan, 168 U. S. 86.

If the principle were to be drawn only from these decisions of the court and the Ross case were not in existence, it is submitted that no one would venture to ask from this court a finding that a conductor of a train, in the discharge of his duties as such, was so clothed with the control of a separate department as to be a vice principal. The obvious inference from this decision is that a conductor is a fellow servant with the other trainmen. Is there anything in the Ross case that negatives this inference, and necessitates a finding as to the powers and duties of a conductor so far at variance with the natural import of the language used in these cases?

In the Ross case the precise point before the court was the correctness of the charge given by the judge in the court below, which was as follows:

"It is very clear that if the company sees fit to place one of its employees under the control and direction of another, that then the two are not fellow servants engaged in the same common employment within the meaning of the rule of law of which I am speaking."

That this charge was incorrect will be admitted. In the decision of this court it was stated that the language might be open to verbal criticism, but it was held that in view of the facts as to the conductor's relations to the train the language was not prejudicial to the plaintiff in error, and that the court would not reverse the finding. The court below decided the

case on the theory that a subordinate was not a fellow servant with the one exercising immediate authority over him. While this court held that such principle was incorrect and that the control which negatived the relation of fellow service must be the control of a department, it held also that under the circumstances of that case the conductor was in control of a separate department, and therefore was not a fellow servant with the injured trainman. This proposition now seems sufficiently clear in view of the explanation of the Ross case in many decisions beginning with Howard vs. Denver & Rio Grande Ry. Co. 26 Fed. Rep. 837, and extending to the latest decisions of this court, and in view of the more complete development and delimitation of the principle of departmental control in several recent cases and notably in the Baugh case. Now that we have a complete exposition of this theory it is easy to see how it furnished the underlying basis for the Ross decision, but as this advantage did not exist at that time, it is equally easy to see how the case gave rise to so much confusion. Although the principle furnished the underlying ground for the decision, yet it is difficult to believe that the court held in mind and clearly recognized the principle in its now accepted aspect. One who was committed to the principle of immediate control could find in the Ross case a basis for his theory, and for applying it wherever an employee was injured by the negligence of one who had charge of the particular piece of work on which the injured man was engaged. Taking into consideration the close division of the court and the fact that the language of the decision can be used to give countenance to either theory, *i. e.* departmental control or immediate control, it may be questioned whether all of the five Justices who concurred in the majority opinion would have subscribed to a statement of the law as now determined and decisively eliminating from the question any consideration of mere control by one servant over another.

Although the principle of the decision is now held to have been a correct one yet the result reached by its application was unexpected.

In Howard vs. Denver & Rio Grand Ry. Co. Mr. Justice Brewer stated:

"I think I only voice the general judgment of the profession in saying that the decision in the Ross case was a surprise and that it carried the doctrine of departmental control to the extreme."

Although the present case can be decided upon the principle which governs both the Ross case and the Baugh case, yet it is submitted that a decision cannot be made which shall be absolutely consistent with the real views entertained by the majority of the court in each case. In the Baugh case after a statement of the theory of departmental control follows this language: "But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice-principal or representative of the master. Even the conclusion announced in the Ross case was not reached by a unanimous court, four of its members being of the opinion that it was carrying the thought of a distinct department too far to hold it applicable to the management of a single train."

In an opinion manifestly written with a purpose of ending the existing confusion in the law, so significant a comment on a former decision of the court could not have been made without an appreciation of its importance, making obvious, as it did, the inference that the court now entertained grave doubt as to the accuracy of the former decision. The later decisions of court have done nothing to weaken this inference, but on the contrary have made sharper by repetition in different language the opinion of the court that a department is not a single piece of work of the same kind with others in the same business, but an essential branch of the business itself.

As the application of the principle made in the Ross case was not then in question no clearer intimation as to the views of the court could have been expected than was made in the above quotation. Mr. Justice Field, however, disagreed with the opinion of the majority and in the freedom of a dissenting opinion stated the effect of the decision, and probably stated no more than would have been admitted by the majority. His words are as follows: "The opinion of the majority not only limits and narrows the doctrine of the Ross case, but in effect denies, even with the limitations placed by them upon

it, the correctness of its general doctrine, and asserts that the risks which an employee of a company assumes from the service which he undertakes, is from the negligence of one in immediate control, as well as from a co-worker, and that there is no superintending agency for which a corporation is liable unless it extends to an entire department of service." In other words, the opinion of the majority states in effect and the dissenting opinion states in terms that the Ross case no longer represents the opinion of the court. Apparently therefore in the case at bar the conductor cannot be held a fellow-servant with the trainmen consistently with the real opinion of all the majority in the Ross case, nor on the other hand could he be held a vice-principal consistently with the opinion of the majority in the Baugh case and the later decisions of the court.

Although a decision of this case may necessarily conflict with the real opinion of some of the majority in the Ross case, yet it is submitted there need be no conflict with any principle involved in that decision. This statement rests on the peculiar view entertained by the court as to the scope of a conductor's power. If the meaning of the word "department" is arrived at by a narrow construction of the principle, it is possible to conceive of a single railroad train constituting a department. In such case it would be necessary that one in control should be absolutely in control in all particulars, and it is on this precise theory that the Ross decision proceeded. This is evident not only from that case itself but from the comments upon it in later cases. The following is the conclusion of the court on the Ross case:

"We agree with them in holding—and the present case requires no further decision—that the conductor of a railway train who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company, and therefore that for injuries resulting from his negligent acts the company is responsible."

The following is quoted from the decision in Northern Pacific R.R. Co. vs. Hambly, 154 U. S. 349: "*In that particular case* the court found that the conductor had entire control and management of the train to which he was assigned, directed at

what time it should start, at what speed it should run, at what stations it should stop and for what length of time, and everything essential to its successful movements, and that all persons employed upon it were subject to his orders. *Under such circumstances* he was held not to be a fellow servant with the fireman, brakemen and engineers, citing certain cases from Kentucky and Ohio which maintained the same view."

The following is from Northern Pacific R.R. Co. vs. Peterson, 162 U. S. 346. "This court held the action was maintainable on the ground that the conductor *upon the occasion in question* was an agent of the corporation, clothed with the control and management of a distinct department, in which his duty was entirely that of direction and superintendence; that he had the entire control and management of the train, and that he occupied a very different position from the brakemen, porters and other subordinates employed on it; that he was in fact and should be treated as a personal representative of the corporation for whose negligence the corporation was responsible to subordinate servants."

However the court arrived at that view as to the scope of the conductor's powers it is evident that in any ordinary case, such as the case at bar, this state of facts is in the nature of things impossible. The court is asked to imagine the result if every train on a railroad constituted a separate department, the head of which, that is the conductor, determined all questions as to the conduct of his department, being responsible to no one under the terms of the organization, and being responsible to the company itself, as to the management of his own department, only when the company sees fit to resume the control which it had vested in him. There would be hundreds of departments using the same rails, each department being governed absolutely by the commands of its conductor. If each conductor determined at what time his train should start, at what speed it should run, and at what stations it should stop, the making of a schedule of trains would be an impossibility, unless all the conductors came together and agreed upon it, and the result of an attempt to come to such an agreement can be more easily imagined than described. It is a matter of common knowledge, and is necessary in the nature of things, that the schedule of trains is made by the general

officer of the operating department. By him are determined all the details as to the running of the trains, at what time they shall start, at what speed they shall run, at what stations they shall stop, of what trainmen the crew shall consist, by what rules they shall be governed, and in fact all of the details as to the management of the train. The conductor is merely one of the crew, appointed to carry out the specific duties assigned him, and to act as it were as a foreman of the crew, in view of the obvious necessity of having some head who shall be responsible to his immediate superior for the proper carrying out of each particular piece of work.

The facts assumed by the court in the Ross case are not binding upon the court in the case at bar. Whatever the facts were then they were merely the facts of that particular case, and have no bearing now. The conclusions of the court as to the scope of the conductor's powers then create no legal fiction to govern future cases in which the scope of these powers is involved. As the real facts are within the knowledge of the court it is submitted that these will determine its action, and not a previously made assumption of fact whether the same was or was not correct at the time.

A short summary of the argument on this head is as follows: The Baugh case determined beyond controversy the outlines of the principle of departmental control. The Ross case made an application of this principle before it had been definitely laid down by this court, and upon narrower lines than are now determined to be correct. Moreover the facts as to a conductor's position, which were then assumed to clothe him with the control of the narrow department therein outlined, were essentially different from the facts obtaining in this or in any ordinary case, and give him powers and duties far in excess of those he really holds. A single train is not a department, and the conductor has not exclusive control and management even of a single train, but is merely the head of that particular piece of work within a single department of the employer's business, and is therefore a fellow servant with the rest of the trainmen.

II.

Assuming that the conductor of a train may be by virtue of his office a vice-principal under some circumstances, yet under

the circumstances of this case the negligence complained of was not the negligence of the conductor as vice-principal.

(a) If the conductor had been vice-principal while the train held together, yet this relation to the head brakeman was severed when the train broke apart, and the engineer became in command of that portion of the train upon which the brakeman was riding. The Baugh case has decided that the portion in charge of the engineer would not be a separate department. But the argument has no bearing to show that the converse is true and that it still remained a part of the conductor's department. The portion of the train which was entirely removed from the conductor's control and from the reach of his orders, and subject to the orders of another person, could hardly be at the same time so under his control and management as to make him a vice-principal as to those employed upon it.

Newport News & Mississippi Valley Co. vs. Howe 52 Fed. Rep. 362 (p. 365)

(b) If the conductor is in any respect a vice-principal as to the other trainmen, he is not necessarily a vice-principal as to all of his duties. In the Ross case the negligence of the conductor upon which the company was held liable was his failure to transmit to the engineer a telegraphic order received by him from the train despatcher, requiring the train to take a certain siding in order to let another train pass. In the construction placed upon the conductor's duties this was considered to be an act in which he represented the principal. Here the only negligence complained of on the part of the conductor was his failure to see that the middle brakeman was on top of the train, where he could have detected the breaking apart and have heard the signals from the engine. If there was a breach of duty on the part of the conductor it was simply a breach of his duty as foreman of the crew, and not of his duty of general management and control of the department as a whole. So far as concerns his mere authority to direct the specific acts of the men under him, he has never been held to be a representative of the principal, but is merely a fellow servant with the rest.

Quinn vs. New Jersey Lighterage Co. 23 Fed. Rep. 363.
Hoke vs. St. Louis, Keokuk & Northern Ry. Co. 11 Mo. App. 574.

FRANK A. FARNHAM,
Counsel for Plaintiff in Error.

No. 229. 42

Brief of Cotter for D. C.

Filed Apr. 3, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 229, Law Docket.

THE NEW ENGLAND RAILROAD COMPANY,
PLAINTIFF IN ERROR,

v.

ROBERT T. CONROY, *Administrator*,
DEFENDANT IN ERROR.

Brief for the Defendant in Error.

JAMES E. COTTER,
Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 229, Law Docket.

THE NEW ENGLAND RAILROAD COMPANY,
PLAINTIFF IN ERROR,

v.

ROBERT T. CONROY, *Administrator*,
DEFENDANT IN ERROR.

Brief for the Defendant in Error.

Statement of the Case.

This was an action of tort, brought by an administrator of a brakeman named Gregory, to recover for his death, owing to alleged negligence of the plaintiff in error and its agents.

On December 15, 1894, a train of the defendant corporation, comprising fourteen cars, a locomotive, and tender, left Worcester, Mass., in the night time, heavily loaded with freight, bound for Providence, R.I., and with a conductor, engineer, fireman, and three brakemen, including the deceased.

"At a point in the State of Rhode Island, away from telegraphic communication and not at a station" the train broke

apart. The engineer, when he discovered this, gave signals to indicate that the train had separated, and ran on two and three quarters miles when he slowed up the engine preparatory to sending back to find the rear portion. The rear portion of the train was not stopped, and came down upon and collided with the engine, and car attached thereto, before escape was possible, thereby causing Gregory's death.

"The three brakemen on the train were a head, a middle, and a rear brakeman. Gregory was the head brakeman, and at once, on discovery of the separation of the train went to the top of the only car left with the engine. The conductor and the middle and rear brakemen had been riding in the caboose car at the rear end of the train, *and did not hear the warning signals* which the engineer gave with the whistle, nor know that the train had broken apart until the collision, but *remained all the time in the caboose.* The night was cold and clear. The accident was near midnight.

"The negligence complained of consisted in the alleged failure of *the conductor in control of the men and in charge of the train*, in view of the character of the night, the character of the road in respect to grades and curves, the speed at which the train was run, and *the liability of the train to part asunder at that place*, to *properly watch* and *supervise* its movements, and the fact that he, in *full knowledge* that the rear and middle brakemen were in the caboose, away from their brakes, *permitted them to remain* there, and failed to order them to the brakes.

"The jury were instructed: 'The conductor of the train, under the rules laid down by the rules of the Supreme Court of the United States, is in a peculiar and special condition. The conductor of the train, as I un-

derstand the theory of the rules of the Supreme Court of the United States, is, in a certain sense, between stations, at least, is in a certain sense like the master of a ship on a voyage; he is beyond the reach of orders, when running his train between stations; and therefore as a matter of *necessity*, as a matter of *public policy*, I suppose he must be held to stand in the place of the *corporation itself*, . . . If you find in this particular case, from the evidence in the case and such common knowledge as jurymen are entitled to use, that by the rules of this road, . . . *the conductor gave directions to the people who worked on the train, gave directions to start the train, gave directions to stop the train, gave directions as to the location and position of the different men on the train*, and also had the *general management* of the train and *control over it* when running *between stations*, then I say to you, gentlemen, that he for this case represents the company, and if injuries resulted from his negligent acts the company is responsible.'"

The jury returned a verdict for the plaintiff.

The Circuit Court of Appeals [redacted] certified the following questions of law for the decision of this court: —

1. Whether the negligence of the conductor was the negligence of a fellow servant of the deceased brakeman?

2. Whether the negligence of the conductor was the negligence of its vice or substituted principal or representative, for which the corporation is responsible?

Law.

The two questions certified present but one inquiry. "Whether the negligence of the conductor was that of a vice-principal?"

I.

The case of *Chicago R. Co.* v. *Ross*, 112 U.S. 377, decides that a conductor, under certain circumstances, is a vice-principal, and this court in later cases, in which attempts to question its authority have been made, has repeatedly asserted that there was an underlying principle in the Ross case applicable to the peculiar facts found in the case as to the authority and duties of a conductor of a railway train removed from the reach of the corporation, when he had absolute management and control, and there was no other personal representative of the master present to supervise the conduct of its business, and that such underlying principle had no application to certain later cases clearly distinguishable from the Ross case.

R.R. Co. v. *Baugh*, 149 U.S. 368.
R.R. Co. v. *Hambly*, 154 U.S. 349.
R.R. Co. v. *Peterson*, 162 U.S. 346.
R.R. Co. v. *Charless*, 162 U.S. 359.
Northern Pac. R.R. v. *Herbert*, 116 U.S. 642.
Oakes v. *Mase*, 165 U.S. 363.

R.R. Co. v. *Baugh*, *supra*, did not overrule the Ross case, as is contended by the plaintiff in error, but, on the contrary, expressly affirmed it. Mr. Justice Brewer, speaking for the court, said, —

> "The regulations of a company cannot make the conductor a fellow servant with his subordinates, *and thus*

overrule the law announced in the Ross case. Neither can it, by calling some one else a conductor, bring a case within the scope of the rule there laid down. In other words, the law is not shifted backwards and forwards by the mere regulations of the company, but applies generally, irrespectively of all such regulations. There is a principle underlying the decision in that case, and the question always is as to the applicability of that principle to the given state of facts."

The foregoing statement of the court has been understood as a direct affirmance of the Ross case.

See *R.R. Co.* v. *Beaton*, 64 Fed. Rep. 563, at 567, GILBERT, J.

In *Mason* v. *R.R. Co.*, 114 N.C. 718, AVERY, J,, said, —

"Upon a careful examination of the late authority . . . [*R.R. Co.* v. *Baugh*], we find that the Supreme Court of the United States has not modified or receded from the principle announced in *Railroad Co.* v. *Ross*, that a conductor in charge of a train is, as to those subject to his orders on the same train, a vice principal."

In the inferior federal courts, the principle of the Ross case has been applied to a master of a vessel, "while she is at sea beyond the reach and control of the owners, and the seaman is subject to the absolute control of the master, and cannot if he would leave the vessel and throw up his engagement".

Per GRAY, J., in "*A. Heaton*", 43 Fed. Rep. 592 at 595.

See "*The Titan*", 23 Fed. Rep. 413.
"*The Car Float*", 61 Fed. Rep. 364.

"*The Julia Fowler*", 49 Fed. Rep. 277.
"*The Frank & Willie*", 45 Fed. Rep. 494.

And where a conductor is in full control between stations, as in this case, the situation is analogous to that of a master of a vessel at sea; he is the one upon whom all the personal duties and powers of the master are *pro tem.* cast; his supremacy is complete, his crew has him alone to look to for that supervision which it is the master's personal duty to give; he has complete control over a most dangerous force; his subordinates have no opportunity, by any form of communication, to appeal to higher authority, and it is beyond their power to leave the service.

In *Borgman* v. *Omaha & St. L. R.R.*, 41 Fed. Rep. 667, O. P. Shiras, J., said, —

> "As I understand the principle to be recognized by the supreme court in the Ross case, it is that where a given operation connected with a railway requires care and oversight for proper performance thereof, and for that purpose there is placed in charge thereof one clothed with the duty of supervising and controlling the given work and having control and direction over those employed, . . . such person in carrying out the duty of control, supervision and management represents the company."

The Ross case has been approved or followed in many cases both in the federal and state courts.

Herbert v. *Northern Pac. R.R.*, 116 U.S. 642.
Canadian Pac. R.R. v. *Johnson*, 61 Fed. Rep. 738.
N.P. R.R. Co. v. *Beaton*, 64 Fed. Rep. 563.

"*The Car Float 16*", 61 Fed. Rep. 364.
Borgman v. *Omaha & St. L. R.R.*, 41 Fed. Rep. 667 (BREWER, J.).
"*The A. Heaton*", 43 Fed. Rep. 592 (GRAY, J.).
Howard v. *Denver &c. R.R.*, 26 Fed. Rep. 837 (BREWER, J.).
N.P. R.R. v. *Cavanagh*, 51 Fed. Rep. 517.
N.P. R.R. v. *Callaghan*, 56 Fed. Rep. 988.
Au v. *R.R. Co.*, 29 Fed. Rep. 72.
"*The Titan*", 23 Fed. Rep. 413.
Howard v. *Canal Co.*, 40 Fed. Rep. 195.
Central Trust Co. v. *R.R. Co.*, 34 Fed. Rep. 616.
R.R. Co. v. *Andrews*, 50 Fed. Rep. 728.
Mason v. *R.R. Co.*, 114 N.C. 718.
R.R. Co. v. *Moore*, 83 Ky. 675.
Boatwright v. *R.R. Co.*, 25 So. Car. 128.
Daniel v. *Chesapeake R.R. Co.*, 36 W. Va. 397.
Clark v. *Hughes*, 51 Neb. 780.
Wooden v. *Western R.R. Co.*, 43 N.Y. S.R. 218; (s.c.) 25 N.Y. Supp. 977.

The same principle was recognized in —

R.R. Co. v. *Fort*, 17 Wall. 553.
R.R. Co. v. *Stevens*, 20 Ohio, 415.
R.R. Co. v. *Keary*, 3 Ohio St. 201.
R.R. Co. v. *Collins*, 2 Duv. 114.

This court has held that the Ross case has no application to a case involving merely operations of a local crew under the superintendence of one of limited control, and who acts entirely under instructions from a superior. (*R.R. Co.* v.

Keegan, 160 U.S. 263; *R.R. Co.* v. *Peterson*, 162 U.S. 346; *R.R. Co.* v. *Charless*, 162 U.S. 359; *Alaska Mining Co.* v. *Whelan*, 168 U.S. 86.) Nor does it apply to a case of injury to a subordinate upon another train, or any other servant of the company over whom the negligent conductor has no control. (*Oakes* v. *Mase*, 165 U.S. 363; *R.R. Co.* v. *Hambly*, 154 U.S. 349.) As was said by Mr. Justice BROWN in *R.R. Co.* v. *Hambly*, *supra*, —

> "It may be observed that quite a different question was raised in that [Ross] case from the one involved here, in fact the liability was placed upon a ground which has no application to the case under consideration, viz., that the person sustaining the injury was under the direct authority and control of the person by whose negligence it was caused."

Nor does it apply to the case of one who, though having control of the power of locomotion, has only temporary authority over one who works with him. (*R.R. Co.* v. *Baugh*, 149 U.S. 368.)

But it has been confined by this and other courts to one having the peculiar powers and duties of a railway conductor, such as the conductor in this case was found to have (Certificate 2), or the master of a vessel at sea.

"It was decided on its own peculiar facts" (*R.R. Co.* v. *Charless*, 162 U.S. 359, at 363), and rests upon "a principle" peculiar to those facts (*R.R. Co.* v. *Baugh*, 149 U.S. 368), and "was intentionally limited to the case of a railway conductor" (per BREWER, J., in *Van Avery* v. *R.R. Co.*, 35 Fed. Rep. 40, at 41) of a certain dignity and situation (*R.R. Co.* v. *Peterson*, 162 U.S. 346); and when the master has no representative, if the conductor is not to be treated as

such personal representative (per FIELD, J., in Ross case, at page 395).

> "The reason underlying this is that by reason of the extent of the authority conferred, the power and discretion vested in such employee, the fact that practical supremacy and control are given him, it is fitting that he should be regarded as the active, present representative of the master, — one in whom the master has placed such confidence, and to whom he has so transferred his powers as to make him his other self."
>
> Per BREWER, J., in *Howard* v. *Denver &c. R.R.*, 26 Fed. Rep. 837.

The language of Mr. Justice BREWER in *Borgman* v. *Omaha & St. L. R.R.*, *supra*, is applicable to the case at bar:

> "Many of the elements which in the case of the conductor were noticed by the Supreme Court in the Ross case as reasons for holding him a vice principal and a controller of a department of service exist here, namely, entire control, separation from all other general officers, service requiring skill and ability and attended with danger, and many employees under him doing different kinds of work tending to accomplish one service."

The principle of the Ross case is supported by public policy and is recognized by subsequent legislation holding railroad corporations responsible to their servants for all injuries caused by the negligence of those having charge or control of trains, locomotives, switches, and signals.

> 7 Am. & Eng. Ency. Law (1st ed.) p. 858, note 1.

43 & 44 Vict. c. 42.
Ala. Code of 1886, secs. 2590, 2591, 2592.
Mass. Acts of 1887, c. 270.
Col. Sess. Laws, 1893, c. 77.
Ind. Acts 1893, c. 130.

II.

It is the personal duty of the master or employer of labor to provide for the safety of his servant, so that no danger shall ensue to him either by the want of a sufficient number of competent colaborers, or by exposing him to a peril known to the master or his representative, and unknown to the servant.

Northern Pac. R.R. v. *Herbert*, 116 U.S. 642, and cases cited.
Flike v. *B. & A. R.R.*, 53 N.Y. 549.
Booth v. *B. & A. R.R.*, 73 N.Y. 38.
Mason v. *Edison Co.*, 28 Fed. Rep. 228.
Mann v. *Delaware Canal Co.*, 91 N.Y. 495.
Heinser v. *Heuvelman*, 45 N.Y. Super. 88.
Coombs v. *New Bedford Cordage Co.*, 102 Mass. 572.
Wheeler v. *Wason Mfg. Co.*, 135 Mass. 294.
Perry v. *Marsh*, 25 Ala. 659.
Nall v. *R.R. Co.*, 129 Ind. 260.
R.R. Co. v. *May*, 108 Ill. 288.
Luebks v. *R.R. Co.*, 59 Wis. 127.
Stephens v. *R.R. Co.*, 86 Mo. 221.
Kelly v. *Cable Co.*, 7 Mont. 70.
Ice Co. v. *Sherlock*, 55 N.W. 294.
R.R. Co. v. *Holt*, 29 Kan. 149.
Baxter v. *Roberts*, 44 Cal. 187.

Neilon v. *Marinette Co.*, 75 Wis. 579.
Cullen v. *Norton*, 52 Hun, 9.
R.R. Co. v. *Blank*, 24 Ill. App. 438.
Spelman v. *Fisher Iron Co.*, 56 Barb. 151.
Laskey v. *R.R. Co.*, 83 Me. 461.
Harrison v. *R.R. Co.*, 79 Mich. 409.
R.R. Co. v. *Smith*, 76 Tex. 611.
Augusta Factory v. *Hill*, 83 Ga. 709.

"It is the duty of the employer to select and retain servants who are fitted and competent for the service; and to furnish sufficient and safe materials, machinery or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exempt himself from such liability. The servant does not undertake to incur the risks arising from the want of *sufficient and skilful colaborers or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him.*"

FIELD, J., in *Northern Pac. R.R.* v. *Herbert*, 116 U.S. 642, and cases cited.

In *Rogers* v. *Ludlow Mfg. Co.*, 144 Mass. 198, it was said by FIELD, J., that, —

"If a master who takes no personal part in the management of his business has any duty to perform toward his servants, it is difficult to say that it is always wholly

performed by doing two things, by employing competent servants, and by furnishing ample means. In order that the business may be properly managed the servants should not only be competent but they should be *numerous enough to do*, and they should have the means of doing, whatever ought reasonably to be done. . . . The duty of a master . . . must be to use reasonable care in the management, and that is to exercise, or have exercised, a *reasonable supervision* over the conduct of his servants, as well as to use reasonable care in seeing that his servants are competent, and are furnished with suitable means for carrying on the business."

And in *Daley* v. *B. & A. R.R.*, 147 Mass. 101, at 114, DEVENS, J., said, in speaking of the duty of a master, —

"The servant charged with providing these appliances stands in the place of the master, and performs the duty incumbent on him. It is not sufficient that he is an intelligent and competent servant; if he neglects this the master is still responsible, unless he shall himself have exercised a reasonable care and supervision over him in seeing that the machinery was in proper condition. Nor is it enough that the master has employed suitable servants and furnished them with suitable materials, and instructed them to keep the machinery in repair. He must see that such servants do their duty."

So, in *Babcock* v. *O.C. R.R.*, 150 Mass. 467, at 472, KNOWLTON, J., said, —

"It is well settled that one who is in some things a mere servant may be made the master's agent to perform duties which are primarily personal to the master. *Moynihan* v. *Hills Co.*, 146 Mass. 586, and cases

cited. If in the present case the section master was intrusted by the defendant with the performance of the duty, or a part of the duty, of supervision of the tracks which a reasonable regard for the safety of its employees required the corporation to perform, the defendant is liable for his negligence in the performance of it."

See also —

Hough v. *R.R. Co.*, 100 U.S. 213.
Flike v. *B. & A. R.R.*, 53 N.Y. 549.
Booth v. *B. & A. R.R.*, 73 N.Y. 38.
Corcoran v. *Holbrook*, 59 N.Y. 517.
Fuller v. *Jewett*, 80 N.Y. 46.
Ford v. *Fitchburg R.R.*, 110 Mass. 241.
Shanny v. *Androscoggin Mills*, 66 Me. 420.

Thus, if a foreman, instead of taking from his gang one of undoubted skill, sends another of doubtful competency to perform a specific task upon the complete performance of which the safety of the other workmen may depend, the foreman's negligence is that of a vice-principal.

Mann v. *Delaware Canal Co.*, 91 N.Y. 495.

So, where a foreman withdrew from some work a part of the gang engaged thereon, and thereby negligently imperilled the safety of those left to complete the work, and an injury happened in consequence of such withdrawal, it was held that in the negligent exercise of his prerogative of withdrawing the men he was acting as a vice-principal.

Mason v. *Edison Co.*, 28 Fed. Rep. 228.

And where a conductor started on his trip with an insufficient crew, and an injury happened to a servant of the

company in consequence, it was held that the negligence of the conductor in attempting to conduct the operations of that train with an insufficient crew was personal negligence of the corporation.

Flike v. *B. & A. R.R.*, 53 N.Y. 549.
Booth v. *B. & A. R.R.*, 73 N.Y. 38.

It was the duty of the plaintiff in error, by its representative, to keep a sufficient force of competent men at their post of duty to properly control the train, and the true rule —

> " . . . is to hold the corporation liable for negligence . . . in respect to such duties as it is required to perform, without regard to the rank or title of the agent entrusted with their performance. . . . The same duty rested upon the company though every man employed had died or run away during the night, and if negligent in discharging it . . . whether in employing improper help or not enough of it, or *in not requiring their presence on the train*, it is upon every just principle responsible for the consequences ".
>
> *Flike* v. *B. & A. R.R.*, 53 N.Y. 549, cited with approval by *Northern Pac. R.R.* v. *Herbert*, 116 U.S. 642.

> "No matter whose immediate negligence it was to start the train without sufficient brakemen it was in law the negligence of the defendant for which it is responsible to persons sustaining injury therefrom, whether servants or third persons."
>
> *Booth* v. *B. & A. R.R.*, 73 N.Y. 38.

In the case at bar it was as much an act of vice-principalship for the conductor to suffer the rear and middle brakemen to absent themselves from actual service on the train when their presence at work was essential to the safety of the deceased, as it was in the two cases last cited for the conductor not to require the presence on the train of three instead of only two brakemen. In each case the omission was a non-performance of the master's duty.

And, by a parity of reasoning, it was as much an act of vice-principalship for the conductor knowingly to permit the withdrawal of two of the three brakemen from service when the concert of all was essential to a safe operation of the train as it was in *Mason* v. *Edison Co.*, *ubi supra*, for the foreman to withdraw some of the gang whose entire service was essential to the safety of those who were left.

The principle of these cases is that it is the master's personal duty, when requiring service to be performed, to depute *and keep* at work a number of men sufficient to reasonably secure the safety of all who are required by his authority to engage in it; and any person to whom he intrusts the power and duty of keeping them at work stands in his place, and his negligence in that respect is the master's negligence.

Northern Pac. R.R. v. *Herbert*, 116 U.S. 642.
Flike v. *B. & A. R.R.*, *ubi supra*.
Booth v. *B. & A. R.R.*, *ubi supra*.
Mason v. *Edison Co.*, 28 Fed. Rep. 228.

The act of the conductor in putting and keeping the deceased at work in a place of unusual danger, known to the conductor to be so, and not so known to the deceased, was the act of a vice-principal.

R.R. Co. v. *Fort*, 17 Wall. 553.
Coombs v. *New Bedford Cordage Co.*, 102 Mass. 572.
Wheeler v. *Wason Mfg. Co.*, 135 Mass. 294.
Perry v. *Marsh*, 25 Ala. 659.
Nall v. *R.R.*, 129 Ind. 260.
R.R. Co. v. *May*, 108 Ill. 288.
R.R. Co. v. *Blank*, 24 Ill. App. 438.
R.R. Co. v. *Holt*, 29 Kan. 149.
Luebks v. *R.R. Co.*, 59 Wis. 127.
Baxter v. *Roberts*, 44 Cal. 187.
Neilon v. *Marinette Co.*, 75 Wis. 579.
Laskey v. *R.R. Co.*, 83 Me. 461.
Harrison v. *R.R. Co.*, 79 Mich. 409.
Stephens v. *R.R. Co.*, 86 Mo. 221.
Kelly v. *Cable Co.*, 7 Mont. 70.
R.R. Co. v. *Smith*, 76 Tex. 611.
Augusta Factory v. *Hill*, 83 Ga. 709.

Thus in *R.R. Co.* v. *Fort*, 17 Wall, 553, a foreman ordered a boy under his charge to work in a dangerous place, and this court, through DAVIS, J., said, —

> "For the consequences of this hasty action the Company are liable, either upon the maxim *Respondent superior*, or upon the obligations, arising out of the contract of service. The order of Collett (the foreman) was their order. They cannot escape responsibility on the plea that he should not have given it. Having intrusted to him the care and management of the machinery, and in so doing made it his rightful duty to adjust it when displaced, and having placed the boy under him with directions to obey him, they must pay the penalty for the tortious act he committed in the

course of his employment. If they are not insurers of the lives and limbs of their employees, they do impliedly engage that they will not expose them to the hazard of losing their lives, or suffering great bodily harm, when it is neither reasonable nor necessary to do so."

And where a car cleaner was ordered under a particular locomotive without being informed that it sometimes for peculiar reasons started without warning, it was held that the act of the foreman in so placing the plaintiff at work was the act and negligence of a vice-principal.

R.R. Co. v. *Holt*, 29 Kan. 149.

The cases cited under this head do not rest upon the Ross case or its principle, but were supported exclusively on the theory of a breach of a personal duty which could not be delegated so as to exempt the master from liability. It is therefore contended that, irrespective of the Ross case, or the reasoning upon which it is based, this conductor was a vice-principal to whom was delegated the master's personal duty, —

1. Of assigning and keeping employed on the work to which the deceased was assigned a sufficient number of competent fellow workmen to perform the task in safety.

2. To refrain from exposing the deceased to unnecessary and unusual perils of which he had no knowledge.

The conductor in the case at bar was found by a jury to have been negligent in the performance of these duties, and for such negligence the plaintiff in error is liable.

JAMES E. COTTER,
Counsel for Defendant in Error.

NEW ENGLAND RAILROAD COMPANY *v.* CONROY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 42. Argued April 3, 4, 1899. — Decided December 4, 1899.

The negligence of a conductor of a freight train is the negligence of a fellow servant of a brakeman on the same train, who was killed by an accident occurring through that negligence.

The negligence of such conductor is not the negligence of the vice or substituted principal or representative of the railroad company running the train, and for which that corporation is responsible.

The general rule of law is that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment.

An employer is not liable for an injury to one employé occasioned by the negligence of another engaged in the same general undertaking; it is not necessary that the servants should be engaged in the same operation or particular work; it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end; and accordingly, in the present case, upon the facts stated, the conductor and the injured brakeman are to be considered fellow servants within the rule.

While the opinion in *Chicago, Milwaukee & St. Paul Railroad Co.* v. *Ross*, 112 U. S. 377, contains a lucid exposition of many of the established rules regulating the relations between masters and servants, and particularly

Statement of the Case.

as respects the duties of railroad companies to their various employés, it went too far in holding that a conductor of a freight train is, *ipso facto*, a vice principal of the company; and in so far as it is to be understood as laying down, as a rule of law to govern in the trial of actions against railroad companies, that the conductor, merely from his position as such, is a vice principal, whose negligence is that of the company, it must be deemed to have been overruled, in effect if not in terms, in the subsequent case of *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368.

THIS was an action against a railroad corporation by a brakeman in its employ to recover damages for a personal injury caused by the negligence of the conductor of one of its trains.

The facts in this case, as stated in the certificate of the Circuit Court of Appeals, were as follows:

"On the fifteenth day of December, 1894, a freight train of the defendant company, drawn by a steam locomotive, and carrying an engineer, a fireman, three brakemen and a conductor, set out from Worcester, in the Commonwealth of Massachusetts, for the city of Providence, in the State of Rhode Island. The train, which consisted of the locomotive and tender, thirteen or fourteen freight cars, and a caboose car, was heavily loaded with freight. The train left Worcester at about 7.15 P.M. and proceeded on its way without accident, until when at a point on the railroad in the State of Rhode Island, away from telegraphic communication and not at a station, and distant from Providence about sixteen miles, the engineer discovered by the motion and behavior of the locomotive that the train had broken apart. He immediately gave signals with the whistle to indicate to the trainmen upon the rear portion of the train that it was broken off, and continued to repeat those signals, which consisted of three rapid blasts of the whistle with very brief intervals between the different threes, while the locomotive and the one car which remained connected ran three quarters of a mile. The locomotive with the connected car ran about two and three quarters miles when the engineer, not being able to see anything of the separated part of the train, and supposing that his signals had been heard and its advance stopped, slowed up the engine preparatory to sending the fireman back

with the lantern and to take steps for restoring the connection of the parts of the train. Before speed had been so reduced that the fireman could alight from the train, the rear portion was discovered close at hand and approaching at great speed. The fireman gave notice of this fact and a signal for the locomotive to go ahead, but before it could gain speed to get away a collision between the two parts of the train took place, and one Gregory, a brakeman, who was on the top of the car still attached to the engine, was thrown from the car by the shock and instantly killed.

"The three brakemen on the train were a head, a middle, and a rear brakeman. Gregory was the head brakeman, and at once, on discovery of the separation of the train, went to the top of the only car left with the engine. The conductor and the middle and rear brakemen had been riding in the caboose car at the rear end of the train, and did not hear the warning signals which the engineer gave with the whistle, nor know that the train had broken until the collision, but remained all the time in the caboose. The night was cold and clear. The accident was near midnight.

"The negligence complained of consisted in the alleged failure of the conductor in control of the men and in charge of the train, in view of the character of the night, the character of the road in respect to grades and curves, the speed at which the train was run, and the liability of the train to part asunder at that place, to properly watch and supervise its movements, and the fact that he, in the full knowledge that the rear and middle brakemen were in the caboose, away from their brakes, permitted them to remain there, and failed to order them to the brakes."

The jury were instructed: "The conductor of the train, under the rules laid down by the rules of the Supreme Court of the United States, is in a peculiar and special condition. The conductor of the train, as I understand the theory of the rule of the Supreme Court of the United States, is, in a certain sense, between stations, at least, is in a certain sense like the master of a ship on a voyage; he is beyond the reach of orders when running his train between stations; and there-

fore as a matter of necessity, as a matter of public policy, I suppose, he must be held to stand in the place of the corporation itself. . . . If you find in this particular case, from the evidence in the case and such common knowledge as jurymen are entitled to use, that by the rules of this road . . . the conductor gave directions to the people who worked on the train, gave directions to start the train, gave directions to stop the train, gave directions as to the location and position of the different men on the train, and also had the general management of the train and control over it when running between stations, then I say to you, gentlemen, that he for this case represents the company, and if injuries resulted from his negligent acts the company is responsible."

The jury returned a verdict for the plaintiff, and assessed damages in the sum of four thousand two hundred and fifty dollars.

The defendant brought the case by writ of error to the United States Circuit Court of Appeals for the First Circuit.

And, upon consideration of the case, after full argument, the judges of that court desired the instructions of the Supreme Court upon the following questions of law arising on the facts as before stated:

1st. Whether the negligence of the conductor was the negligence of a fellow servant of the deceased brakeman?

2d. Whether the negligence of the conductor was the negligence of its vice or substituted principal or representative, for which the corporation is responsible?

Mr. Frank A. Farnham for plaintiff in error.

Mr. James E. Cotter for defendant in error.

Mr. Justice Shiras, after making the above statement, delivered the opinion of the court.

It may be doubted whether the questions of law presented to us are really raised by the facts as certified. No facts are stated from which the jury might have found that, at the

time and place of the accident, there was any special reason why the brakemen should have been ordered by the conductor to take their places at the brakes, and therefore it is by no means evident that there was any dereliction of duty on the part of the conductor.

Nor is it clear that the negligence of the conductor, if negligence it was, in permitting the brakemen to ride in the caboose, was the proximate cause of Gregory's injuries. When the train parted the engineer had charge and control of the locomotive and attached cars, and it would seem to have been his duty, as it was within his power, to have prevented the subsequent collision of the detached parts. And, in that event, the case would be ruled by *Baltimore & Ohio Railroad Co.* v. *Baugh*, 149 U. S. 368, where it was held that the engineer and fireman of a locomotive engine, running alone on a railroad and without any train attached, are fellow servants, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former.

However, waiving these suggestions, and proceeding on the assumptions of the courts below that it was the duty of the conductor, at the time and place of the accident, to have the brakemen on the top of the cars where they could apply the hand brakes, and that his failure to do so was the proximate cause of the injury to the plaintiff's intestate resulting from the subsequent collision of the detached portions of the train, we meet the question, Would, in such a state of facts, the company be liable to the injured brakeman for the negligence of the conductor?

There is a general rule of law, established by a great preponderance of judicial authority in the English and in the state and Federal courts, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment. But there have been conflicting views expressed in the application of this rule in cases where the employer is a railroad company, or other large organization, employing a number of servants engaged in distinct and separate departments of service; and our present inquiry is whether the relation between

the conductor and the brakeman of a freight train is that of fellow servants, within the rule, or whether the conductor is to be deemed a vice principal, representing the railroad company in such a sense that his negligence is that of the company, the common employer.

Unless we are constrained to accept and follow the decision of this court in the case of *Chicago, Milwaukee & St. Paul Railway Co.* v. *Ross*, 112 U. S. 377, we have no hesitation in holding, both upon principle and authority, that the employer is not liable for an injury to one employé occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end; and that, accordingly, in the present case, upon the facts stated, the conductor and the injured brakeman are to be considered fellow servants within the rule.

We shall refer to a few of the authorities which establish these principles. *Farwell* v. *Boston & Worcester Railroad*, 4 Met. 49, is the leading case in Massachusetts. The question was thus stated by Chief Justice Shaw:

"This is an action of new impression in our courts, and involves a principle of great importance. It presents a case, where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose — that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is,

whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer."

After discussing the principles of law and reason applicable to the case, the Chief Justice proceeded:

"In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment, and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and, like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion.

"It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same and the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how

near or how distant must they be to be in the same or different departments? In a blacksmith's shop persons working in the same building at different fires may be quite independent of each other, though only a few feet distance. In a ropewalk several may be at work on the same piece of cordage, at the same time, at many hundred feet from each other and beyond the reach of sight and voice, and yet acting together.

"Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand toward him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant does not depend exclusively upon the consideration, that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers, for the negligence of a servant. . . . The responsibility which one is under for the negligence of his servant, in the conduct of his business, toward third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good."

In *Holden* v. *Fitchburg Railroad Co.*, 129 Mass. 268, which was a case in which damages were claimed by a person employed to act as a laborer in the removal of a mass of earth overhanging the defendant's railroad, on the alleged ground of negligence on the part of a roadmaster who had charge of that portion of the railroad, the case of *Farwell* v. *B. & W. Railroad*, 4 Met. 49, was followed; and it was held, on principles established in that and subsequent cases, that it makes no difference that the servant whose negligence causes the injury is a submanager or foreman, of higher grade or greater authority than the plaintiff; and, in discussing the cases, Chief Justice Gray cited the case of *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326, 332, 334, 335, 336, and some of the observations made by the justices who delivered judgments therein in the House of Lords. Thus Lord Chancellor Cairns said:

"The master is not and cannot be liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business." "But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master." Lord Colonsay said: "I think that there are duties incumbent on our masters with reference to the safety of laborers in mines and factories, on the fulfilment of which the laborers are entitled to rely, and for the failure in which the master may be responsible. A total neglect to provide any system of ventilation for the mine may be of that character. Culpable negligence in supervision, if the master takes the supervision on himself, or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty; or the failure to provide or supply the means of providing proper machinery or materials may furnish ground of liability."

And see likewise the case of *Clifford* v. *Old Colony Railroad*, 141 Mass. 564, in which it was held that a section hand in the employ of a railroad corporation cannot maintain an action against the corporation for personal injuries caused by a collision between a hand car on which he was at work and an engine of a train run by servants of the corporation if the accident was occasioned by the negligence of the section boss and the engineer of the train.

In *Sherman* v. *Rochester & Syracuse Railroad*, 17 N. Y. 153, it was held by the New York Court of Appeals that a servant who sustains an injury from the negligence of a superior agent engaged in the same general business, can maintain no action against their common employer, although he was subject to the control of such superior agent, and that, accordingly, a brakeman upon a railroad whose duty it is not to apply the brakes except when directed by the engineer or conductor cannot maintain an action against their common employer for an injury resulting from the culpable speed at which the engineer and conductor ran the train. And this appears to be the settled doctrine in the State of New York. *Besel* v. *N. Y. C. & H. R. Railroad*, 70 N. Y. 171, 173; *De Forest* v. *Jewett*, 88 N. Y. 264.

The Supreme Court of Pennsylvania has held, in numerous cases, and it is settled law in that State, that a fellow servant, within the meaning of the rule, is any one serving the same master, and under his control, whether equal, inferior or superior to the injured person in his grade or standing, and the fact that the injured servant was under the control of the servant by whose negligence the injury was caused makes no difference. *Weger* v. *Pennsylvania Railroad Co.*, 55 Penn. St. 460; *Lehigh Valley Coal Co.* v. *Jones*, 86 Penn. St. 432.

In *Columbus & Indianapolis Central Railway* v. *Arnold*, 31 Indiana, 174, the Supreme Court of Indiana held, reversing some previous cases to the contrary, that it is the duty of a railroad company to use all reasonable care in the proper construction of its road, and in supplying it with the necessary equipment, and in the selection of competent subordinates to supervise, inspect, repair and regulate the machinery, and to regulate and control the operation of the road; and that if

these duties are performed with care by the company, and one of the persons so employed is guilty of negligence by which an injury occurs to another, it is not the negligence of the master, and the company is not responsible.

Without following further the history of this subject in the courts of the several States, we may state that, generally, the doctrine there upheld is that of the cases herein previously cited, except in the courts of the States of Ohio, Kentucky and perhaps others, in which the rule seems to obtain that while the master is not liable to his servant for any injury committed by a servant of equal degree in the same sphere of employment, unless some negligence is fixed on the master personally, yet that he is liable for the gross negligence of a servant superior in rank to the person injured, and is also liable for the ordinary negligence of a servant not engaged in the same department of service.

Leaving the decisions of the state courts, and coming to those of this court, we find the latter to be in substantial harmony with the current of authority in the state and English courts. From this statement the case of *Chicago, Milwaukee & St. Paul Railroad* v. *Ross*, 112 U. S. 377, must, perhaps, be excepted, and to it we shall revert after an examination of our other cases.

Randall v. *Baltimore & Ohio Railroad*, 109 U. S. 478, was the case of an action in the Circuit Court of the United States for the District of West Virginia against a railroad corporation by a brakeman in its employ for personal injuries received, while working a switch, by being struck by one of its locomotive engines; and it was unanimously held by this court, affirming the court below, that the plaintiff could not recover, although the injury was occasioned by the negligence of the engineman in running his engine too fast, or not giving due notice of its approach. In the course of the opinion, which was pronounced by Mr. Justice Gray, he said:

"The general rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment. This court has not hitherto had

occasion to decide who are fellow servants within the rule. . . . Nor is it necessary, for the purposes of this case, to undertake to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the courts of the several States; because persons standing in such a relation to one another as did the plaintiff and the engineman of the other train are fellow servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the House of Lords, and in the English and Irish courts, as is clearly shown by the cases cited in the margin. They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object — the moving of the trains."

Northern Pacific Railroad v. *Herbert*, 116 U. S. 642, was a case wherein it appeared that a brakeman suffered an injury by reason of the fact that the brakes which he was called upon to apply were broken and out of order, and it was held, *per* Mr. Justice Field, that it was the duty of the company to furnish sufficient and safe materials, machinery or other means by which service is to be performed, and to keep them in repair and order, and that as this duty had not been fulfilled the plaintiff was entitled to recover. There was another question in that case as to the import and effect of a statute of Dakota, in which Territory the accident took place, providing that "an employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé," and that "an employer must, in all cases, indemnify his employé for losses caused by the former's want of ordinary care."

It was held, by a majority of the court, that these provisions

of the Dakota code expressed the general law that an employer is responsible for the injury to his employés caused by his own want of ordinary care; that his selection of defective machinery, which is to be moved by steam power, is of itself evidence of a want of ordinary care, and allowing it to remain out of repair, when its condition is brought to his notice, or by proper inspection might be known, is culpable negligence; that the cars, in that case, had been defective for years; that the brakes were all worn out, and their condition had been called to the attention of the yard master, who had control of them while in the yard, and might have been ascertained, upon proper inspection, by the officer or agent of the company charged with the duty of keeping them in repair, yet nothing was done to repair either brakes or cars; that, in such circumstances, the company had not exercised ordinary care to keep the cars and brakes in good condition; and that, therefore, under the provisions of the statute, the company was bound to indemnify the plaintiff. The minority of the court considered that the case was governed by the local statute, and that the statute, properly construed, relieved the employer, under the facts of the case, from liability to the injured employé. They declined to express any opinion upon the question of liability apart from the statute.

Quebec Steamship Co. v. *Merchant,* 133 U. S. 375, was an action brought in the Circuit Court of the United States for the Southern District of New York by one Merchant, who was employed as a stewardess of the steamship Bermuda, belonging to the defendant company. It appeared that the ship's company consisted of thirty-two persons, divided into three classes of servants, called three departments — the deck department, the engineers' department, and the steward's department. The captain, the first and second officers, the purser, the carpenter and the sailors were in the deck department; the engineers, the firemen and the stokers were in the engineers' department; the steward, the waiters, the cooks, the porter and the stewardess were in the steward's department. At the close of the evidence the defendant's counsel requested the court to charge the jury to find a verdict for the defendant on the ground that the injury sustained by the plaintiff was occasioned, if there was

any negligence, by the negligence of a fellow servant. This the court refused to do. There was a verdict for the plaintiff, and the case was brought to this court. Here it was contended that, as the carpenter whose negligence was alleged as the cause of the accident, was in the deck department, and the stewardess in the steward's department, those were different departments in such a sense that the carpenter was not a fellow servant with the stewardess. But Mr. Justice Blatchford, speaking for the entire court, said:

"The injuries to the plaintiff were caused solely by the negligence of one or the other of two fellow servants who were in a common employment with her, and there was no violation or omission of duty on the part of the employer contributing to such injuries. Neither of her fellow servants stood in such relation to her or to the work done by her, and in the course of which her injuries were sustained, as to make his negligence that of the employer. The case, therefore, falls within the well settled rule, as to which it is unnecessary to cite cases, which exempts an employer from liability for injuries to a servant by another servant, and does not fall within any exception to that rule which destroys the exemption of the employer when his own negligence contributes to the injury, or when the other servant occupies such a relation to the injured party or to his employment, in the course of which her injury was received, as to make the negligence of such servant the negligence of the employer."

The next notable case is that of *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368, in which it was held that an engineer and fireman of a locomotive, running alone and without any train attached, were fellow servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former. In the course of the opinion Mr. Justice Brewer said:

"It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow servants and puts an end to the master's liability. On the contrary, all the cases proceed on the ground of some

breach of positive duty resting upon the master, or upon the idea of superintendence or control of a department. It has ever been affirmed that the employé assumes the ordinary risks incident to the service; and, as we have seen, it is as obvious that there is risk from the negligence of one in immediate control as from one simply a coworker. That the running of an engine by itself is not a separate branch of service seems perfectly clear. The fact is, all the locomotive engines of a railroad company are in the one department, the operating department; and those employed in running them, whether as engineers or firemen, are engaged in a common employment and are fellow servants."

We shall have occasion to revert to this case when we come to consider the decision in *Chicago, Milwaukee & St. Paul Railroad* v. *Ross.*

In *Northern Pacific Railroad* v. *Hambly*, 154 U. S. 349, it was held that a common day laborer in the employ of a railroad company, who, while working for the company under the order and direction of a section boss or foreman, on a culvert on the line of the company's road, receives an injury by and through the negligence of the conductor and of the engineer in moving and operating a passenger train upon the company's road, is a fellow servant with such engineer and such conductor, in such a sense as exempts the railroad company from liability for the injury so inflicted; and Mr. Justice Brown, in delivering the opinion of the court, observed:

"To hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service, as, for instance, between brakemen of the same train, or two seamen on the same ship, are comparatively rare. In a large majority of cases there is some distinction either in respect to grade of service, or in the nature of the employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing

the injury was such as to put him rather in the category of principal than of agent, as, for example, the superintendent of a factory or railway, and the employments were so far different that, although paid by the same master, the two servants were brought no further in contact with each other than as if they had been employed by different principals."

In *Central Railroad Co.* v. *Keegan*, 160 U. S. 259, *Baltimore & Ohio Railroad Co.* v. *Baugh* was approved and followed in respect to its statement as to what constitutes a vice-principal.

In *Northern Pacific Railroad Co.* v. *Peterson*, 162 U. S. 346, an action had been brought in the Circuit Court of the United States for the District of Minnesota by Peterson to recover damages against the railroad company, alleged to have been caused by the negligence of the foreman of a gang of laborers, engaged in putting in repair sections of the railroad. The foreman had power to hire and discharge the hands who composed the gang, and had exclusive charge of their direction and management in all matters connected with their employment. The plaintiff recovered a verdict, and the judgment of the Circuit Court thereon was affirmed by the Circuit Court of Appeals of the Eighth Circuit. The cause was brought to this court, and the judgments of the courts below were reversed. The opinion of this court was by Mr. Justice Peckham, in which he reviewed the authorities, and expressed the following conclusions:

"The general rule is, that those entering into the service of a common master become thereby engaged in a common service and are fellow servants, and, *prima facie*, the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasona-

bly safe and competent men to perform their respective duties, and it has been held in many States that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters it is a neglect of a duty which he personally owes to his employés, and if the employé suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such. . . . The rule is that, in order to form an exception to the general law of non-liability, the person whose neglect caused the injury must be one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department. This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case.

"When the business of the master or employer is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the individuals placed by the master in charge of these separate branches and departments of service, and given entire and absolute control therein, may properly be considered, with respect to employés under them, vice-principals and representatives of the master as fully and as completely as if the entire business of the master were placed by him under one superintendent. . . . This boss of a small gang of ten or fifteen men, engaged in making repairs upon the road wherever they might be necessary, over a distance of three sections, aiding and assisting the regular gang of workmen upon each section, as occasion demanded, was not such a superintendent of a separate department, nor was he in control of such a distinct branch of the work of the master, as would be necessary to

render the master liable to a coemployé for his neglect. He was in fact, as well as in law, a fellow workman; he went with the gang to the place of work in the morning, stayed there with them during the day, superintended their work, giving directions in regard to it, and returned home with them in the evening, acting as a part of the crew of the hand car upon which they rode. The mere fact, if it be a fact, that he did not actually handle a shovel or a pick, is an unimportant matter. Where more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss and the other subordinate, but both are nevertheless fellow workmen."

The last case we shall refer to is that of *Oakes* v. *Mase*, 165 U. S. 363, where it was declared to be the settled law of this court that the relation of fellow servants exists between an engineer, operating a locomotive on one train, and the conductor on another train on the same road; and *Northern Pacific Railroad* v. *Poirier*, 167 U. S. 48, where it was held that a brakeman on a regular train of a railroad and the conductor of a wild train, on the same road, are fellow servants, and the railroad company is not responsible for injuries happening to the former by reason of a collision of the two trains, caused by the negligence of the latter and by his disregard of the rules of the company.

Without attempting to educe from these cases a rule applicable to all possible circumstances, we think that we are warranted by them in holding in the present case that, in the absence of evidence of special and unusual powers having been conferred upon the conductor of the freight train, he, the engineer, and the brakemen, must be deemed to have been fellow servants within the meaning of the rule which exempts the railroad company, their common employer, from liability to one of them for injuries caused by the negligence of another.

This conclusion is certainly sound unless we are constrained to hold otherwise by the decision in *Chicago, Milwaukee & St. Paul Railroad* v. *Ross*, already referred to. That was a case wherein an action was maintained, brought by a locomo-

tive engineer to recover damages received in a collision caused by the negligence of the conductor of the train; and it must be admitted that the reasoning employed by Mr. Justice Field, in his opinion expressing the views of a majority of the court, and the conclusion reached by him, cannot be reconciled with the other decisions of this court hereinbefore cited. We do not think that it would be proper to pass by the case without comment, nor yet to attempt to distinguish it by considerations so narrow as to leave the courts below in uncertainty as to the doctrine of this court on a subject so important and of such frequent recurrence. The case in hand exemplifies the perplexity caused by the *Ross case*. The trial court gave effect to it as establishing the proposition that the conductor of an ordinary freight train, with no other powers than those assumed to belong to such an employé by virtue of such a position, is a vice-principal, against whose negligence the company is bound to indemnify all the other employés on the train. Yet it is evident that the judges of the Circuit Court of Appeals did not find themselves able to either accept or reject such a proposition, as they have certified it to us as one on which they desire our instructions. Such a course plainly evinces doubts whether, in view of the decisions both before and since, the case of *Chicago, Milwaukee & St. Paul Railroad* v. *Ross* furnishes a safe and approved rule to guide the trial courts.

While the opinion in the *Ross case* contains a lucid exposition of many of the established rules regulating the relations between masters and servants, and particularly as respects the duties of railroad companies to their various employés, we think it went too far in holding that a conductor of a freight train is, *ipso facto*, a vice-principal of the company. An inspection of the opinion shows that that conclusion was based upon certain assumptions, not borne out by the evidence in the case, as to the powers and duties of conductors of freight trains. Thus it was said:

"We know from the manner in which railroads are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and man-

agement of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow servant with the fireman, the brakemen, the porters and the engineer; the latter are fellow servants in the running of the train under his direction; as to them and the train, he stands in the place of and represents the corporation."

We think these statements attribute duties and powers to conductors of freight trains much greater than ordinarily exist. Several of the instances of control assigned to the conductor really belong to the engineer, who, as railroads are now operated, is a much more important functionary in the actual movements of the train, when in motion, than the conductor. It is his hand that regulates the application of the brakes that control the speed of the train, and in doing so he acts upon his own knowledge and observation, and not upon orders of the conductor. Particularly has this become the case since the introduction of the air train-brake system. We can take notice of the act of March 2, 1893, c. 196, 27 Stat. 531, which enacted "that it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power-driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train-brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand-brake for that purpose." We do not refer to this statute as directly applicable to the case in hand, but as a legislative recognition of the dominant position of the engineer.

Cases are cited in the opinion in the *Ross case* in which it has been held by the Supreme Court of Ohio and by the Court of Appeals of Kentucky that railroad companies are responsible for negligence of conductors to other employés.

But those courts do not accept the ordinary rule exempting the master from liability to a servant for the negligent conduct of his fellows. At least, they do not apply such a rule to the extent that this and other courts have done. They hold that no service is common that does not admit a common participation, and no servants are fellow servants when one is placed in control over the other.

In so far as the decision in the *case of Ross* is to be understood as laying it down, as a rule of law to govern in the trial of actions against railroad companies, that the conductor, merely from his position as such, is a vice-principal, whose negligence is that of the company, it must be deemed to have been overruled, in effect if not in terms, in the subsequent case of *Baltimore & Ohio Railroad* v. *Baugh*, before cited. There Mr. Justice Brewer, in commenting upon the proposition applied in the *Ross case*, that the conductor of a train has the control and management of a distinct department, said:

"But the danger from the negligence of one specially in charge of the particular work is as obvious and as great as that of those who are simply coworkers with him in it. Each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other; if he assumes the one, he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and, thus, assumed by the employé, it includes all coworkers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not control, what test or rule is there which determines? Rightfully this, there must be some personal wrong on the part of the master, some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible. It may be said that this is only passing from one difficulty to another, as it leaves still to be settled what is positive duty and what is personal neglect; and yet if we analyze these matters a little, there will appear less diffi-

culty in the question. Obviously, a breach of positive duty is personal neglect; and the question in any given case is, therefore, what is the positive duty of the master? He certainly owes the duty of taking fair and reasonable precautions to surround his employé with fit and careful coworkers, and the employé has a right to rely on his discharge of this duty. If the master is careless in the matter of employing a servant, it is his personal neglect; and if without proper care in inquiring as to his competency he does employ an incompetent person, the fact that he has an incompetent, and therefore an improper employé is a matter of his personal wrong, and owing to his personal neglect. And if the negligence of this incompetent servant works injury to a co-servant, is it not obvious that the master's omission of duty enters directly and properly into the question of responsibility? If, on the other hand, the master has taken all reasonable precautions to inquire into the competency of one proposing to enter into his service, and as the result of such reasonable inquiry is satisfied that the employé is fit and competent, can it be said that the master has neglected anything, that he has omitted any personal duty? And this notwithstanding that after the servant has been employed it shall be disclosed that he was incompetent and unfit? If he has done all that reasonable care requires to inquire into the competency of his servant, is any neglect imputable to him? No human inquiry, no possible precaution, is sufficient to absolutely determine in advance whether a party under certain exigencies will or will not do a negligent act. So it is not possible for the master, take whatsoever pains he may, to secure employés who will never be guilty of any negligence. Indeed, is there any man who does not sometimes do a negligent act? Neither is it possible for the master, with any ordinary and reasonable care, always to secure competent and fit servants. He may be mistaken, notwithstanding the reasonable precautions he has taken. Therefore, that a servant proves to be unfit and incompetent, or that in any given exigency he is guilty of a negligent act resulting in injury to a fellow servant, does not of itself prove any omission of care on the part of the master in his employment; and

it is only when there is such omission of care that the master can be said to be guilty of personal wrong in placing or continuing such servant in his employ, or has done or omitted aught justifying the placing upon him responsibility for such employé's negligence.

"Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools and the machinery, owes a positive duty to his employé in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employé by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employés to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. But it may be asked, is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing

safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is as fully discharged, when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution."

Accordingly, the conclusion reached was that, although the party injured was a fireman, who was subject to the orders and control of the engineer, in the absence of any conductor, there was no liability on the company for negligence of the *ad interim* conductor.

That this reasoning and conclusion were inconsistent with those in the *Ross case* is not only apparent on comparing them, but further appears in the dissenting opinion in *The Baugh case* of Mr. Justice Field, who was the author of the opinion in the case of Ross. He said:

"The opinion of the majority not only limits and narrows the doctrine of the *Ross case*, but, in effect, denies, even with the limitations placed by them upon it, the correctness of its general doctrine, and asserts that the risks which an employé of a company assumes from the service which he undertakes is from the negligence of one in immediate control, as well as from a coworker, and that there is no superintending agency for which a corporation is liable, unless it extends to an entire department of service. A conclusion is thus reached that the company is not responsible in the present case for injuries received by the fireman from the negligent acts of the conductor of the engine. . . . The principle in the *Ross case* covers this case, and requires, in my opinion, a judgment of affirmance."

So likewise Mr. Chief Justice Fuller dissented in *The Baugh case* for the express reason that, in his opinion, the case came within the rule laid down in *Chicago, Milwaukee & St. Paul Railroad* v. *Ross*.

To conclude, and not to subject ourselves to our own previous criticism, of proceeding upon assumptions not founded on

the evidence in the case, we shall content ourselves by saying that, upon the facts stated and certified to us by the Judges of the Circuit Court of Appeals, we cannot, as a matter of law based upon those facts and upon such common knowledge as we, as a court, can be supposed to possses, hold a conductor of a freight train to be a vice-principal within any safe definition of that relation.

Accordingly we answer the first question put to us in the affirmative, and the second question in the negative.

MR. JUSTICE HARLAN dissenting.

I concurred in the opinion and judgment of this court in *Chicago & Milwaukee Railroad* v. *Ross*, 112 U. S. 377, and do not now perceive any sound reason why the principles announced in that case should not be sustained. In my judgment the conductor of a railroad train is the representative of the company in respect of its management, all the other employés on the train are his subordinates in matters involved in such management, and for injury received by any one of those subordinates during the management of the train by reason of the negligence of the conductor the railroad company should be held responsible. As the conductor commands the movements of the train and has general control over the employés connected with its operation, the company represented by him ought to be held responsible for his negligence resulting in injury to other employés discharging their duties under his immediate orders. If in such case the conductor be not a vice-principal, it is difficult to say who among the officers or agents of a corporation sued by one of its employés for personal injuries ought to be regarded as belonging to that class. Having these views, I am compelled to withhold my assent from the opinion and judgment in this case.